

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:)	
)	
READOPTION OF 312 IAC 9)	Administrative Cause
GOVERNING FISH AND WILDLIFE)	Number: 14-005D
)	(LSA Document #14-17(F))

RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULE

A. INTRODUCTION

For consideration is the readoption of 312 IAC 9 governing fish and wildlife. The rules set forth authorizations and requirements regarding the taking, possession, transportation, sale, and offer for sale of wild animals. Ind. Code § 14-22-2-6 requires the DNR to adopt rules governing wild animals in Indiana and provide for their protection. The text of 312 IAC 9 can be accessed through the Legislative Services Agency Internet site at: <http://www.in.gov/legislative/iac/T03120/A00090.PDF>.

312 IAC 9 is proposed to be readopted in its entirety and without amendment. Under 312 IAC 2-2-4(b), where the rules are being readopted in their current form without amendments, the Director of the Division of Hearings may approve preliminary action. However, the Commission retained authority to take final action on readoptions.

The Director of the Division of Hearings approved preliminary action on March 19, 2014. It is the standard practice to readopt rules by article, and 312 IAC 9 is now submitted for consideration as to final action.

B. READOPTION ANALYSIS REQUIRED UNDER IND. CODE § 4-22-2.5-3.1

Linnea Petercheff, with the Department of Natural Resources, Division of Fish and Wildlife was appointed as the Small Business Regulatory Coordinator for this rule

readoption. Petercheff provided the following analyses of potential impacts to small business for the proposed readoption of 312 IAC 9:

SMALL BUSINESS IMPACT STATEMENT (EIS)
LSA Document #14-17

REVIEW UNDER IC 4-22-2.5-3.1

The continued need for the rule.

312 IAC 9 governs wild animals as authorized by IC 14-22-2-6 for the Department of Natural Resources (DNR). The rules set forth authorizations and requirements regarding the taking, possession, transportation, sale, and offer for sale of wild animals. Indiana Code 14-22-2-6 requires the DNR to establish rules governing wild animals in Indiana and provide for their protection.

The readoption of these rules is necessary without any changes in order to ensure that these rules do not expire. State law in IC 14-22-6-1 prohibits a person from taking, chasing, or possessing a wild animal except as provided by law (IC 14-22) or this article (312 IAC 9). Therefore, these rules are necessary to provide for the ability to take, possess, chase, and sell wild animals. State law in IC 14-22-34-12 also requires a review of the endangered species list every two (2) years and to make modifications that are necessary for the survival of the species in Indiana; the lists of endangered species are found in 312 IAC 9-3-19, 312 IAC 9-4-14, 312 IAC 9-5-4, 312 IAC 9-6-9, and 312 IAC 9-9-4.

The nature of any complaints or comments received from the public, including small businesses, concerning the rule or the rule's implementation by the agency.

The Natural Resources Commission (NRC) has received comments from the public, including small businesses, during the promulgation of these rules, and the Department has received comments during the implementation of these rules. Comments from the public pertain to the seasons, bag limit, and methods allowed for hunting, fishing and trapping and the collection, possession and sale of wild animals. Small businesses have commented on several rules, including the rule governing deer hunting and commercial deer processors.

The complexity of the rule, including any difficulties encountered by:

- (A) the agency in administering the rule; or**
- (B) small businesses in complying with the rule.**

All rules in 312 IAC 9 were reviewed, and changes were completed in 2010 to consolidate, clarify, reorder, and simplify language. The DNR is able to administer and enforce the rules with little difficulty. Small businesses are able to comply with these rules without much difficulty.

The extent to which the rule overlaps, duplicates, or conflicts with other federal, state, or local laws, rules, regulations, or ordinances.

Very few rules overlap or duplicate existing federal or state laws. They are as follows:

There is a duplication of state law in 312 IAC 9-1-9.7 for the definition of inland water (also defined in IC 14-8-2-131.7) and in 312 IAC 9-2-1 governing taking, chasing, and possessing wild animals (also in IC 14-22-6-1).

There is a duplication of federal law in 312 IAC 9-1-7 for the definition of “falconry.” However, since this term is used in IC 14-22-23 and in 312 IAC 9-10-13.1, it needs to be defined in Indiana Administrative Code.

The rule in 312 IAC 9-4-7.2 that authorizes the taking of brown-headed cowbirds, common grackles, red-winged blackbirds, rusty blackbirds, Brewer’s blackbirds, and American crows that are causing damage to crops, livestock, or wildlife or constituting a health hazard or nuisance is a duplication of federal law in 50 CFR 21.43. The taking of American crows in 312 IAC 9-4-7.1 duplicates federal law in 50 CFR 21. However, without a rule authorizing the taking of these birds, state law in IC 14-22-6-1 would prohibit their take from the wild in Indiana.

Some rules authorizing the possession of certain species of animals conflict with local ordinances that prohibit their possession. However, state law in IC 36-1-3 prohibits a unit of government from regulating conduct that is regulated by a state agency, except as expressly authorized by statute, and that has not been done for the possession of certain wild and exotic animals that are regulated by the DNR. Furthermore, IC 14-22-10-10 provides that the state is the sole regulator of the trapping of wild animals and in IC 14-22-10-11, a unit of local government may not regulate in any way the ownership, possess, sale, transfer, or transportation of a raptor that is under a falconry license issued by the DNR.

The length of time since the rule was last reviewed under this section or otherwise evaluated by the agency, and the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule since that time.

A number of changes have been made to most of the fish and wildlife rules since the last readoption. All rules in 312 IAC 9 were reviewed, and changes were completed in 2010 to consolidate, clarify, reorder, and simplify language. Additional changes have been made since that time to properly provide for the protection, care, survival, and management of wild animals in Indiana.

In the process of carrying out its mission, the Department is continually reviewing its effectiveness in providing standards and guidance to small businesses, private individuals, and professionals in complying with its rules. Technology, economic conditions, and other factors have not changed in a way that would warrant modifications to 312 IAC 9 at this time.

MOST RECENT SMALL BUSINESS IMPACT ANALYSIS LSA Document #14-17

REVIEW UNDER IC 4-22-2.1-5

The degree to which the factors analyzed in a previous economic impact statement have changed since the statement was prepared

The factors analyzed in the economic impact statements regarding amendments to 312 IAC 9 (LSA Documents # 08-886(F), 09-44(F), 09-479(F), 09-486(F), 09-616(F), 09-984(F), 10-104(F), 10-230(F), 10-418(F), 10-501(F), 10-614(F), 10-667(F), 11-101(F), 11-196(F), 11-358(F), 11-470(F), 12-109(F), 12-65(F), 12-115(F), 12-381(F), 12-403(F), and 12-670(F)) have not changed since the statements were prepared.

LSA #08-740(F): Final adoption was not given to proposed changes to 312 IAC 9-2-3 in that it affected small businesses that are licensed taxidermists. As a result, these small businesses will still need to purchase turkey heads and feet, although the fiscal impact is expected to be less than \$200 per year for those taxidermists that do full mounts of wild turkeys.

The changes to the youth deer season in LSA #09-60(F) were changed again in LSA #11-101(F) to allow the youth hunter to take more antlerless deer, in addition to the one antlered deer that was authorized in LSA #09-60.

LSA #10-614(F): The factors analyzed are the same, although the cost of the cages, lighting, and food for the furbearers has increased since the time the rule was established, so the cost per business may be higher than \$300 per year.

LSA #11-358(F): There were unanticipated impacts to businesses and local governments as the result of the original proposed rule; therefore, some changes were made and given final adoption to reduce these impacts by exempting counties that are adjacent to the Ohio River from this new size requirement for black bass taken from rivers and streams in 312 IAC 9-7-2(c). There was estimated to be a loss of revenue to small businesses that rely, at least partially, on revenue brought in by participants of bass tournaments for lodging, food, gas, and other supplies because of the rule change. Black bass caught in tournaments, and any other time, now has to be less than 12 inches or over 15 inches except in the rivers and streams in the counties adjacent to the Ohio River and named in 312 IAC 9-7-6(c)(1). Alternatives include making the new size limit apply only to designated rivers and streams (not those where fishing tournaments are held), reduce the size limit to 13 or 14 inches (instead of less than 12 and more than 15), or not make this change at all. However, the Natural Resources Commission considered these alternatives and approved the one deemed the best by removing the counties adjacent to the Ohio River and named in 312 IAC 9-7-6(c)(1) from the new requirement of less than 12 inches or over 15 inches.

Any regulatory alternatives included in the statement under IC 4-22-2.1-5(a)(5)

LSA #08-740(F): Same as EIS; LSA #08-886(F): Same as EIS; LSA #09-044(F): N/A, no business impacts; LSA #09-060(F): N/A, no business impacts; LSA #09-479(F): N/A, no business impacts; LSA #09-486(F): Same as EIS; LSA #09-616(F): Same as EIS; LSA #09-984(F): N/A, no business impacts; LSA #10-104(F): Same as EIS ; LSA #10-230(F): N/A, no business impacts; LSA #10-418(F): N/A, no business impacts; LSA #10-501(F): N/A, no business impacts; LSA #10-614(F): Same as EIS ; LSA #10-667(F): N/A, no business impacts; LSA #11-101(F): N/A, no business impacts; LSA #11-196(F): Same as EIS

LSA #11-358(F): There were unanticipated impacts to businesses and local governments as the result of the original proposed rule; therefore, some changes were made and given final adoption to reduce these impacts by exempting counties that are adjacent to the Ohio River from this new size requirement for black bass taken from rivers and streams in 312 IAC 9-7-2(c). There was estimated to be a loss of revenue to small businesses that rely, at least partially, on revenue brought in by participants in bass tournaments for lodging, food, gas, and other supplies because of the rule change. Black bass caught in tournaments, and any other time, now has to be less than 12 inches or over 15 inches except in the rivers and streams in the counties adjacent to the Ohio River and named in 312 IAC 9-7-6(c)(1). Alternatives include making the new size limit apply only to designated rivers and streams (not those where fishing tournaments are held), reduce the size limit to 13 or 14 inches (instead of less than 12 and more than 15), or not make this change at all. However, the Natural Resources Commission considered these alternatives and approved the one deemed the best by removing the counties adjacent to the Ohio River and named in 312 IAC 9-7-6(c)(1) from the new requirement of less than 12 inches or over 15 inches.

LSA #11-470(F): N/A, no business impacts; LSA #12-109(F): Same as EIS; LSA #12-065(F): Same as EIS ; LSA #12-115(F): Same as EIS

LSA #12-381(F): Same as EIS, although it could allow assistants of commercial fishing license holders to be in boats other than the one the license holder is in; however, this will make enforcement of the license requirement difficult and allow for an unlimited number of assistants.

LSA #12-403(F): Same as EIS; LSA #12-670(F): Same as EIS

Any regulatory alternatives not considered by the agency at the time the statement was prepared that could be implemented to replace one (1) or more of the rule's existing requirements

LSA #11-358(F): There were unanticipated impacts to businesses and local governments as the result of the original proposed rule; therefore, some changes were made and given final adoption to reduce these impacts by exempting counties that are adjacent to the Ohio River from this new size requirement for black bass taken from rivers and streams in 312 IAC 9-7-2(c). There was estimated to be a loss of revenue to small businesses that rely, at least partially, on revenue brought in by participants in bass tournaments for lodging, food, gas, and other supplies because of the rule change. Black bass caught in tournaments, and any other time, now has to be less than 12 inches or over 15 inches except in the rivers and streams in the counties adjacent to the Ohio River and named in 312 IAC 9-7-6(c)(1). Alternatives include making the new size limit apply only to designated rivers and streams (not those where fishing tournaments are held), reduce the size limit to 13 or 14 inches (instead of less than 12 and more than 15), or not make this change at all. However, the Natural Resources Commission considered these alternatives and approved the one deemed the best by removing the counties adjacent to the Ohio River and named in 312 IAC 9-7-6(c)(1) from the new requirement of less than 12 inches or over 15 inches.

LSA #12-381(F): Same as EIS, although one other alternative not considered could allow assistants of commercial fishing license holders to be in boats other than the one the license holder is in pursuant to 312 IAC 9-8-1(e). However, this will make enforcement of the license requirement difficult with an unlimited number of assistants that could be working in various locations.

Executive Order 13-03 requires agencies to “suspend rulemaking action on any proposed rules for which a notice of intent to adopt a rule... was not submitted to the office of the *Indiana Register* on or before January 14, 2013.” The requirements of Executive Order 13-03 were restated, along with additional compliance information in Financial Management Circular 2013-01. On May 2, 2013 Christopher D. Atkins, Director, Office of Management and Budget, provided written correspondence to all agency heads stating that the moratorium set forth in Executive Order 13-03 was not applicable to re-adoptions and that an exception did not need to be sought or received.

As specified by Executive Order 2-89 and Financial Management Circular 2010-4, fiscal analyses of the rule readoption proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent to Readopt a Rule, to the Office of Management and Budget and the Administrative Rule Oversight Committee on January 28, 2014. In a letter dated March 20, 2014, Brian E. Bailey, Director, State Budget Agency, recommended that the proposed rule readoption be approved.

C. NOTICE OF INTENT TO READOPT AND RECOMMENDATION FOR FINAL ACTION

On January 22, 2014, the “Notice of Intent to Readopt” 312 IAC 9 was posted to the *Indiana Register* at 20140122-IR-312140017RNA as anticipated by Ind. Code § 4-22-2.5-2 and Ind. Code § 4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 9 without changes. The notice also provided that a person had 30 days to submit a written request to the Natural Resources Commission, through the Small Business Regulatory Coordinator, seeking to have a particular section of the rule readopted separately. If such a request had been made, the Commission would have been required to complete the full rule adoption process for the section requested to be readopted separately.

In this instance, no written request has been received. The Commission may either submit the rule for filing with the Publisher under Ind. Code § 4-22-2-35 or elect the procedure for readoption under Ind. Code § 4-22-2. It is recommended that the Commission approve for readoption 312 IAC 9, without amendment for subsequent filing with the Publisher.

Dated: April 1, 2014

Sandra L. Jensen
Hearing Officer